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Sanford Levinson

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Some Too (or Blessedly) Short Responses to Five Thoughtful Readers

Sanford Levinson

First things first: I am obviously grateful both to the editors of the *Pepperdine Law Review* for organizing this symposium and to the participants for their careful readings and observations. For better and, no doubt, worse, I do not have the time (even if the *Review* had the pages) for the kind of response that each of the pieces deserves. Instead, I will confine myself to literally one or two observations about each of them, with the hope that they will engender further conversation about a topic that will inevitably remain both of theoretical interest and (perhaps all-too-) practical politics. I will adopt the “alphabetic principle” in addressing my interlocutors.

Paul Finkelman is both a friend of long duration—a term, I have been told, that is better, once people reach a certain age, than “old friend”—and one of my central teachers with regard to the reality of slavery as part of the American political and constitutional tradition. It is not surprising that he has written a powerful essay criticizing the conventional historiography of “The Compromise of 1850.” I could not agree with him more strongly that one’s response to that compromise (and others) involving slavery, including, of course, the initial set of compromises in 1787, depends very strongly on necessarily counter-factual beliefs as to what would have happened had there been no such compromises.¹

As have I argued elsewhere,² what distinguishes “deliberative exchange” from “bargaining” is that the latter need not involve any changes of mind about the underlying merits of one’s position, only that the political circumstances suggest making certain concessions, however painful, in order to achieve other purposes (including maintaining civil peace).³ I confess that I am one of those people who believed that secession would have been

1. Paul Finkelman, *The Cost of Compromise and the Covenant With Death*, 38 PEPP. L. REV. 845 (2011).

2. See Sanford Levinson, Courts as Participants in “Dialogue”: A View from American States, 59 U. KAN. L. REV. (forthcoming 2011).

3. Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821 (2011).

much more likely to succeed in 1850 than was the case a decade later; I am therefore fascinated by the material Finkelman brings to bear to suggest it was the South that was indeed significantly strengthened, relative to the rest of the Union, during the decade of the 1850s.⁴ I do not have enough knowledge of my own to say whether I am completely convinced by his argument, but I am positive that, not for the first time, he has issued a challenge to which other historians must respond. And, as suggested above, acceptance of his analysis would necessarily have implications for one's views on the Compromise of 1850 (for starters).

My only disagreement with Finkelman comes, perhaps ironically, from his very first sentence: "Professor Levinson argues with some passion for compromise in constitutional law."⁵ I would have written that I argued, surely with passion, for the necessity of grappling with the importance—indeed, near-ubiquity—of compromise in constitutional law. Some of these compromises are easily defensible; others might indeed have been sufficiently "rotten" to merit rejection, even if other, merely "bad" ones, are perhaps tolerable given likely alternatives in the absence of such compromises.

Mark Graber is another friend of long duration, as well as a major influence on my own thought on each and every topic of American constitutional development. It is not the case that we always agree, but there is literally no one whose criticisms I take more seriously. In this instance, though, I am not sure that we disagree in any fundamental respect. I take the key sentence in his comment to be that "[s]ome protection for constitutional evils is the fate of ongoing constitutional projects in [a] diverse society."⁶ One might well cite one of Graber's own heroes, James Madison, who reminded Edward Everett in a letter toward the end of Madison's long life that "[f]ree constitutions will rarely if ever be formed without reciprocal concessions; without articles conditioned on & balancing each other."⁷ For Madison, of course, one of these concessions was the necessary "evil" of equal voting power in the Senate.⁸ It is difficult for me to believe that anyone could seriously gainsay either Graber or Madison.

My own central example, obviously, was drawn from the pained history of chattel slavery as part of our constitutional heritage. Graber effectively does a fast forward and addresses the unhappiness that many—perhaps

4. See Finkelman, *supra* note 1, at 851–53.

5. *Id.* at 845.

6. Mark A. Graber, *Constitutional Democracy, Human Dignity, and Entrenched Evil*, 38 PEPP. L. REV. 889, 902 (2011).

7. Letter from James Madison to Edward Everett (Aug. 28, 1830), in *FEDERALISM* 100, 104 (Anthony J. Bellia, Jr. ed., 2010).

8. THE FEDERALIST NO. 62, at 331 (James Madison) (J.R. Pole ed., 2005) (referring to the Senate as a "lesser evil," the greater evil being the prospect of no Constitution at all should the small states reject the project of constitutional reformation).

most—thoughtful Americans feel about our current abortion policy, though, obviously, the reasons for the unhappiness are not shared, insofar as those who view abortion as murder occupy a quite different intellectual universe from those who view access to the full range of reproductive choices as an essential part of recognizing what it means to be an autonomous person.⁹ Though it is, in fact, impossible for me to take truly seriously those who object to the Affordable Care Act (“Obamacare”) as unconstitutional, let alone “evil,” I know all too well that some people I not only like personally but also respect as serious and committed thinkers do indeed view the required purchase of medical insurance as a violation of overriding libertarian principles.

How are such cleavages resolved in pluralistic societies? Should, for example, the losers in a political process necessarily submit to the winners, even if, as is inevitably the case, any existing process, very much including our own, is deeply flawed from the perspective of some “ideal” kind of political theory?¹⁰ I do not think that losers have such obligations. Or, if there are such obligations, they are, at most, *prima facie*, and thus subject to being overridden by sufficiently good reasons. The state, after all, gets to override various constitutional norms by evoking “compelling state interests.” Why shouldn’t free citizens of a “Republican Form of Government,” which the Constitution announces as its aspiration—not to mention the achievement of a society that will “establish Justice”—be able equally to enunciate their own sense of “compelling public purposes” that justify civil disobedience? I take it that Graber would argue that one should, generally speaking, restrain such impulses in the name of preserving civil peace, including peace with persons one regards as in some sense committed to “evil” projects. And I think he is quite right in suggesting such caution (or prudence). But I am confident that he would reach a limit and become “uncompromising” in his commitment to overriding norms. Both compromise and intransigence have their claims. Our task is to figure out which should prevail and under what circumstances.

Carrie Menkel-Meadow is, like Steven Smith, someone I have long admired, though I have not had the opportunity to develop the same kind of collegueship with them as I have with Finkelman, Graber, or Richard Weisberg. That obviously does not make her comments of lesser interest or importance. Menkel-Meadow suggests, I think accurately, that there is no algorithm that can tell us when one disposition should triumph over the

9. See Graber, *supra* note 6.

10. See Sanford Levinson, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

other. Though “compromise” obviously raises the most serious of moral questions, we must “examine it and evaluate it, in variable or ‘relative, no deracinated or ‘universal’ circumstances.”¹¹ That being said, she offers some valuable rules of thumb by which to determine when acquiescence might be trumped by commitment to particular values. Thus, she notes that “‘one-off’ Constitutional compromises (such as slavery and the Senate) must be judged and measured differently than those that allow for “repetition, correction, accountability and reciprocity norms, as in other political processes.”¹² What makes a constitutional compromise “one-off,” as a matter of practicality, may be the particular difficulty of amending a given constitution. As it happens, the United States has the most difficult constitution to amend of any such document on the planet; just as relevant is to note that each of the fifty American state constitutions is easier to amend than is the United States Constitution.¹³ Compromise might thus be less costly in systems that allow for easier changes of mind. Indeed, one might read Menkel-Meadow as suggesting that, generally speaking, classic parliamentary sovereignty might have its advantages over the American kind of constitutionalism inasmuch as the latter may build too much rigidity into our polity. Even if that is not the case—as may well be true—we might still wish to “deconstitutionalize” many of our controversies and thus at least question the primacy of judges offering inevitably controversial—and often altogether implausible—interpretations of what Justice Jackson memorably described as “the majestic generalities of the Bill of Rights”¹⁴ or, for that matter, the Equal Protection Clause. The most extreme version of this argument would abolish judicial review.¹⁵ More moderately, one might simply support a reduced degree of judicial “finality,” either through allowing “overrides” of Supreme Court decisions by, say, supermajorities of Congress or by easing the process of constitutional amendment.

Steven Smith offers a characteristically close and thoughtful reading of my essay. His introductory pages sound very much like Max Weber’s famous injunction, in his classic essay *Politics as a Vocation*, that political leaders must reject the “ethics of ultimate ends” in favor of the “ethic of responsibility” for one’s society.¹⁶ More recently, Michael Walzer defended the propriety of political leaders being willing to “dirty” their hands in

11. Carrie Menkel-Meadow, *The Variable Morality of Constitutional (and Other) Compromises: A Comment on Sanford Levinson’s Compromise and Constitutionalism*, 38 PEPP. L. REV. 903, 905 (2011).

12. *Id.* at 907.

13. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 254–62 (Sanford Levinson ed., 1995).

14. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

15. See Mark V. Tushnet, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

16. See Max Weber, *Politics as a Vocation*, http://www.ne.jp/asahi/moriyuki/abukuma/weber/lecture/politics_vocation.html (last visited Feb. 25, 2011).

making inevitable compromises attached to responsible stewardship.¹⁷ I happen to agree with Walzer.¹⁸ But, obviously, one should dirty one's hands, especially with regard to "rotten compromises," only if there really are "compelling" reasons, of the highest magnitude, for doing so. Smith presumably agrees with Menkel-Meadow that what is called for (non-pejoratively) is casuistry rather than the application of a universalist algorithm, and he provides just such casuistic analysis of Lincoln's particular response to the dilemmas presented by chattel slavery.

The key to his argument is to accept chattel slavery as an *existing* evil, rather than one introduced to America by either the Framers of the Constitution or, even more certainly, by Lincoln. Thus, he in effect takes Margalit to task for conflating "establishment" with "maintenance."¹⁹ There is surely something to this—we distinguish, after all, between "adverse possession" and new attempts at trespass—but I think that Smith overestimates its importance. At the very least, returning to the important point of Finkelman's essay, one must have a firm sense of what is empirically possible and to move to *disestablishing* existing evils as quickly as reasonably possible, where "reasonably," of course, invites a certain kind of cost-benefit analysis in terms of calculating likely resistance, etc. Perhaps one can defend Lincoln for not being a Garrisonian advocating secession from a Union with slaveholders. But I am not so clear that one can defend Lincoln's callow defense of the Fugitive Slave Law of 1850 as necessary compliance with the "deal" made by the 1787 Framers or his support of the original Thirteenth Amendment, the "Corwin Amendment," that would have guaranteed to those states in which slavery already existed its maintenance in perpetuity unless the slave states chose on their own to abolish the (wicked) institution. I would also be interested in Smith's response to Graber's powerful book, *Dred Scott and the Problem of Constitutional Evil*,²⁰ which I read as suggesting that perhaps there was something to be said for James Buchanan's view, expressed in his final Message to Congress,²¹ that secession, although illegal, did not merit a forceful response by the remainder of the United States:

17. Michael Walzer, *The Problem of Dirty Hands*, in *TORTURE: A COLLECTION* 61, 64–74 (Sanford Levinson ed., 2004).

18. See Sanford Levinson, *Contemplating Torture: An Introduction*, in *TORTURE: A COLLECTION* 23, 38 (Sanford Levinson ed., 2004).

19. Steven D. Smith, *Lessons from Lincoln*, 38 *PEPP. L. REV.* 915 (2011).

20. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

21. PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 264 (5th ed. 2006) (quoting James Buchanan, Fourth Annual Message to Congress on the State of the Union (Dec. 3, 1860), *THE AM. PRESIDENCY PROJECT*, <http://www.presidency.ucsb.edu/ws/index.php?pid=29501> (last visited Feb. 25, 2011)).

[I]t may be safely asserted that the power to make war against a State is at variance with the whole spirit and intent of the Constitution. Suppose such a war should result in the conquest of a State; how are we to govern it afterwards? Shall we hold it as a province and govern it by despotic power? In the nature of things, we could not by physical force control the will of the people and compel them to elect Senators and Representatives to Congress and to perform all the other duties depending upon their own volition and required from the free citizens of a free State as a constituent member of the Confederacy.

But if we possessed this power, would it be wise to exercise it under existing circumstances? The object would doubtless be to preserve the Union. War would not only present the most effectual means of destroying it, but would vanish all hope of its peaceable reconstruction. Besides, in the fraternal conflict a vast amount of blood and treasure would be expended, rendering future reconciliation between the States impossible. In the meantime, who can foretell what would be the sufferings and privations of the people during its existence?

The fact is that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war. If it cannot live in the affections of the people, it must one day perish.²²

What, precisely, is “wrong” with this argument, unless it is, of course, that acceptance would have tolerated the entrenchment of slavery in the seceding states? But, of course, that is exactly what Lincoln was willing to do via his support of the Corwin Amendment. So does Smith—and other defenders of Lincoln—share his “Union mysticism” that regards the maintenance of the existing United States as the most overriding of all values? Why is *that* the line at which one adopts obduracy instead of compromise? (Quite obviously, as Smith recognizes, I am more comfortable with question marks than with periods.)

Finally, there is another friend of long duration with whom I have often engaged over many years. Engagement, of course, is not synonymous with agreement, and Weisberg continues to be frustrated with my over-tolerance for compromise; he sees this as equal to the betrayal of truly fundamental values that deserve our overriding allegiance. If I am obsessed by slavery and its role in American constitutional history, he is obsessed by the rise of Nazism in Germany and then, following the outbreak of World War II, the collaboration with Nazis in various other countries. Given Weisberg’s own deep attachments to France, he is particularly (and rightly) concerned with

22. *Id.*

the betrayal not only of universal, but also of particularly French, values by Vichy France, which purported to be an official government representing the French nation rather than a rag-tag group of opportunistic collaborators with true evil.

An important part of his indictment involves what he believes to be a loose, far-too-slippery, approach to texts, whether sacred (as with the Christian (mis)interpretation of Jewish texts) or the legal texts of a mundane polity. I suspect that Weisberg would be uncomfortable with this particular analogy, but there is certainly more than a trace of the Lutheranism—"Here I stand, I can do no other"—that Weber was in fact attacking in *Politics as a Vocation*.²³ I have no trouble agreeing with many of his particular arguments about moral cowardice during the Vichy regime (and elsewhere). Many people could have behaved more decently without, it appears, taking inordinate risks. And, of course, some behaved decently even when they knew that their own lives were at stake. These "righteous" persons should be endlessly celebrated. That being said, even if one condemns the particular leaders of Vichy France for an easy willingness to compromise, one cannot elide the issue of what duties leaders have to make compromises that, by definition, they would prefer not to make. Are Masada or, for Texans, the Alamo, truly inspirational templates, or is timely negotiated surrender that allows one's community to survive until another day at least sometimes to be preferred to suicidal grand gestures? Would Weisberg have joined those in the 1950s proclaiming "Better Dead Than Red" as a way of defending the possibility of nuclear war and its consequences if faced with unjustifiable incursions by the Soviet Union?

But, as a matter of fact, Weisberg does not confront what I regard as the most important of my three examples presented in my Brandeis Lecture, which involves decisions at the *design* stage of constitutions. Here, of course, we are *not* discussing the interpretation of preexisting texts, but rather deciding what should go in the texts themselves, whether the substantive protection of certain political values (e.g., the guarantee against abolition of the international slave trade until 1808) or the adoption of political procedures that work, in context, to protect the forces of evil (e.g., the Three-Fifths Compromise). And, if one has decided, in the name of political prudence, to make relevant compromises, either "rotten" or merely "awful," then what is the interpreter's duty with regard to enforcing them in the future?

23. MAX WEBER, *POLITICS AS A VOCATION* (1918), *reprinted in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77–128 (H. H. Gerth & C. Wright Mills trans. & eds., 1946), *available at* <https://www.d.umn.edu/~bmork/2111/readings/weberpoliticsasavocation.htm>.

After all, Justice Joseph Story, in what I regard as the single most appalling decision in our history, *Prigg v. Pennsylvania*²⁴—yes, I do think it is worse than *Dred Scott*²⁵—claims in part to be the faithful enforcer of the negotiated deal made in 1787 to construct (and then to preserve) a Union even if that meant collaborating with slave masters and, in *Prigg*, slave catchers. William Lloyd Garrison famously described the Constitution as a “Covenant with Death” that demanded enforcement by judges with legal integrity. This is why he believed that no honorable person should agree to be a judge in such a system, precisely because there was no way to combine both legal integrity and personal integrity. This was, as Weisberg well knows, the topic of Bob Cover’s great book, *Justice Accused: Antislavery and the Judicial Process*.²⁶ The basic question, of course, is whether one could *always* achieve what I have elsewhere termed “happy endings” by (legitimately) manipulating legal texts to accord with the demands of justice to which both Cover and Weisberg are so inspiringly committed. And if the answer is no, then is the correct response *not* Garrisonian withdrawal from the bench, but, rather, to engage in what would otherwise be *illegitimate* manipulation in the name of the overriding moral value? (What would I ever do without question marks?)

There are, obviously, no final answers to the questions raised by my five interlocutors. What I am most confident of is that this conversation is very much worth having and, even more, continuing. My fondest hope is that this symposium—a word with a genealogy going back to the Platonic dialogues—can prove useful to others in their own wrestling with truly eternal questions (whether or not they have eternally true answers).

24. 41 U.S. (16 Pet.) 539 (1842).

25. 60 U.S. (19 How.) 393 (1957).

26. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).